No. 80-1102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LAWRENCE LUNG, et al.,

*Appellants,*

VS.

FRED L. O'CHESKEY, et al.,

*Appellants,*

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

# BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellants respectfully submit the following Brief Opposing Motion to Dismiss or Affirm (which has been filed by Appellees herein) as follows:

## ARGUMENT

Appellees' Motion to Dismiss or Affirm seeks to remove this Court's attention from its recent cases involving state taxation on Indian reservations (including one from the New Mexico courts which mirrors the instant one in several ways) either by ignoring them or by categorizing them as simply involving the preemption principle, which is not an issue here. In view of the similarity of the issues and concepts, Appellants believe these recent decisions establish the substantiality of the questions involved here, and

deserve closer and more accurate analysis in determining whether this case will receive the plenary review it deserves.

Although preemption appears to have been the basis for invalidating state taxes in two *(White Mountain Apache Tribe v. Bracker*, ____U.S.____, 100 S.Ct. 2578 (1980), and *Central Machinery Co. v. Arizona Tax Com'n.*, ____U.S.____, 100 S.Ct. 2592 (1980)) of the four cases cited by Appellants, Apellees ignored the other two, both of which con- cern the critical issue of "fiscal relation". *Washington v. Confederated Tribes*, ____U.S. ____, 100 S.Ct. 2069 (1980), ignored by Appellees, invalidated by a 7-2 vote Washington's motor vehicle tax assessed on its market value, because it was not tailored to cover only taxable off-reservation use, where the Indian taxpayer could be said to be the recipient of state services. Also ignored by Appellees was the product of its own court system, *Tiffany Construction Co. v. Bureau of Revenue*, 603 P.2d 332 (N.M. App. 1979) in which this court entered a summary order, ____U.S.____, 100 S.Ct. 3041 (1980), reversing the remanding the case in light of White Mountain Apache Tribe and Central Machinery Co., supra. Tiffany concerned the New Mexico gross receipts tax levied upon a road construction contractor for work done entirely on a Navajo reservation in New Mexico, on which some of the roads were maintained by the state.[1]

Relevant to this case is the fact that all of these cases discuss the extent to which the taxing authority is getting something for nothing, which is the crux of this case. Generalizations of the past shed little, if any, light on the question of what fiscal values this Court deems attributable *to the state* so as to justify the exaction of the full measure of the state's power to tax. It is abundantly clear from the history of the New Mexico courts that 'minimal contact" is all that is required, ignoring how little or non-existent the fiscal

1. After remand, the New Mexico Court of Appeals reinstated its opinion in Tiffany, stating that preemption had not been raised by the taxpayers. This opinion has not appeared in the national reporter system, and may not appear, as counsel for the taxpayers advise that the New Mexico Supreme Court has granted certiorari in the case but has not set it for arguments as of February 9, 1981. The Court of Appeals opinion after remand may be found in State Bar of New Mexico Bulletin and Advance Opinions (ISSN 0039-0038), Vol. 19, N. 40, October 2, 1980, at pp. 918, 919.

relationship may be between what is taxed and how much the state has to do with creating, protecting or benefiting the taxable incidents. "Even if Tiffany had received no other benefits from the state, it would be subject to the state tax from the simple fact of having engaged in business here," *Tiffany Construction Co. v. Bureau of Revenue*, 603 P.2d 332 at 335 (N.M. App. 1979). This concept, reiterated by the New Mexico Supreme Court in this case in the phrase "fruits of civilization", is a meaningless generalization in terms of economic realities unless the state is entitled to full credit for the fact that WSMR is within the boundaries of the state, and nothing else is required. If this is the law, then why are the recent Indian reservation cases sprinkled through with discussions of services, benefits or protection afforded by the state? "The state has a legitimate governmental interest in raising revenues . . .strongest when the tax payer is recipient of state services," *Washington v. Confederated Tribes*, ____ U.S. ___, 100 S.Ct. at 2083 (1980); "The Due Process Clause may prohibit a state from imposing a tax on the use of completely private roads if the tax is designed to reimburse it for use of state-owned roads," Justice Stevens in dissent, *White Mountain Apache Tribe v. Bracker*, ____U.S.____, 100 S.Ct. at 2591, n.7 (1980); "The state has no interest in raising revenues from the use of Indian roads that costs it nothing and over which it exercises no control," Justice Powell dissenting and concurring, ____U.S. ____, 100 S.Ct. 2599 (1980). These cases demonstrate the need for this Court to squarely answer the serious questions raised by this case concerning the power of the states to fully tax non-residents who cross over into their boundaries, but enjoy no more in the way of State-conferred benefits than do those merely passing through untaxed.

Appellees correctly state that preemption is not applicable here and that, as this Court has stated, the Buck Act, 4 USC §104 et seq. "provides comprehensive federal guidance for state taxation of those *living within federal areas*," *McClanahan v. State Tax Com'n.*, 411 U.S. 164 at 176 (1973) (emphasis added). But the Buck Act does not comprehensively sweep away the non-resident's constitutional immunity from taxation by a state that renders them

no benefits or protection, nor does the state so claim. Is the scope of the Appellants' Privileges and Immunities under Article IV, §2 less than the protection afforded an out-of-state corporation under the due process and commerce clauses of the constitution, which protect it against a "gross overreaching", *Norfolk and W. Ry. Co. v. Missouri State Tax Com'n.*, 390 U.S. 317 (1968)? This would be an anamolous result in light of the fact that the corporations are not even considered "citizens" for Article IV, §2, purposes, *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1869).

The other point which Appellees put forth is that the issues in this case have already been "decided" by this court, citing numerous cases in which summary dismissals of appeals have been entered, and concluding that entry of such a summary ordered here would be a meaningful and clear expression of the law in the area. Such is not the case as summary dispositions are "obviously not of the same precedential value as would be an opinion of this Court treating the question on the merits," Justices Marshall, Douglas and Brennan in dissent, *Richardson v. Ramirez*, 418 US 24 at 83 n. 27 (1974).

Appellees attach much significance to *State of Alaska v Petronia* 418 P.2d 755 (Wash. 1966), dism'd 389 U.S. 7 (1967), which Appellants believe to be distinguishable on several significant bases. First, the seamen earning in Alaskan waters that portion of their income (16%, etc.) which Alaska sought to tax was not on an exclusive federal enclave, as WSMR is, over which the state has no jurisdiction. This court has recognized the power of the states to regulate activities on off-shore waters, *Toomer v. Witsell*, 334 U.S. 385 (1948), so Petronia's income was no less "earned in Alaska" than if it had been in downtown Juneau, merely because it was earned off-shore. Secondly, the "business productivity generated by Alaska (which) was acccountable for the wages earned by the defendants when they were in Alaskan waters" contrasts with the nature of WSMR, a military testing site created by the federal government out of the desolate desert sands of New Mexico, isolated from any community or other business productivity generated by the state. Neither do Appellants view WSMR as their "home away from home" as a sailor in an Alaskan port might do. The proportional assessment on Alaska earned income also

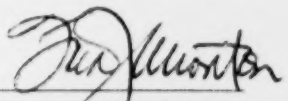
contrasts with the exaction by New Mexico of the full measure of its income tax on Appellants, coupled with the required inclusion of non-New Mexico income, as set forth in Section B of Appellants' Jurisdictional Statement herein.

In the area of the medical-dental expense and grocery tax rebates, attacked in Section C of Appellants' Jurisdictional Statement, it should be noted that in one of the leading cases cited by Appellees, *Goodwin v. State Tax Com'n.*, 146 N.Y.S. 2d 172, aff'd mem., 1 N.Y. 2d 680, 133 N.E. 2d 77, dism'd 352 U.S. 805 (1965), the court pointed out that the deductions disallowed to non-residents (residential real estate taxes, interest on the home mortgage, life insurance premiums and medical expenses) were "not allowances in a flat amount for all residents, which might be regarded as the equivalent of exemptions or exclusions from income within the meaning of the Travis case (*Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60). They are allowed only upon a case by case basis, on account of an actual expenditure *by the particular taxpayer*," 146 N.Y.S. 2d 172 at 181 (emphasis added). Such is not the case here as to New Mexico's exclusion or rebate of $5.00 and $40.00 *per exemption*, respectively, for residents only for medical-dental expense and grocery taxes.

## CONCLUSION

Appellants believe the Motion to Dismiss or Affirm should be denied and overruled and this Court should note probable jurisdiction of this Appeal, or alternatively, issue a writ of certiorari to the New Mexico Supreme Court.

Respectfully submitted,

By: 

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**CERTIFICATE OF SERVICE**

This is to certify that on the 16 day of February, 1981, I, FRED J. MORTON, a member of the Bar of the Supreme Court of the United States, mailed, postage prepaid, three (3) copies of the foregoing Brief Opposing Motion To Dismiss Or Affirm to the Honorable Jeff Bingaman, Attorney General of the State of New Mexico, P.O. Drawer 1508, Bataan Memorial Building, Santa Fe, New Mexico 87503, and to Ms. Sarah Bennett, Assistant Attorney General, Taxation and Revenue Department of the State of New Mexico, P.O. Box 630, Santa Fe, New Mexico 87509, attorneys for Appellees. I further certify that all parties required to be served have been served.

FRED J. MORTON